No. 15146

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR.,
LOUIS GLEN BALLARD, and
VIC BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING AFTER DECISION, BY LOUIS GLEN BALLARD

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ARGUMENT

The opinion of the United States Court printed in the Advance Decisions indicates that the Appeal of Ballard was lost in a sordid story of intrigue, double dealing, and feuds among the Spiccuzas and the Hadzimas. It is so clear that Ballard's Appeal was lost in a "package deal".

One has only to read the decision of the United States Court of Appeals in the above-entitled action to know that the Appeal of Ballard was not carefully considered and his points on appeal overlooked.

For example on Page 4 of the Advance Opinion of the Court it is said:

> "Although Duke now attempts himself to escape therefrom, the trial of the case was permeated by his charge that the prosecution was the result of plot or conspiracy by certain public officials, in conjunction with organized labor, to frame Duke on the charges in the instant case. These statements and innuendos were made in the first instance by Duke himself and included, among those supposed to be assisting in the combination to frame him, a federal judge who tried a companion case and members of the staff of the United States Attorney conducting previous prosecutions as well as the prosecution of the instant case. The trial court took this whole situation into consideration in his rulings upon the question of representation. We see no reason why the trial court should have been compelled to allow Duke to turn this proceeding into a Roman holiday, WITH THE OTHER DEFENDANTS and government witnesses and the public officials AS THE VICTIMS. (Emphasis added)."

In arguing that Ballard's motion for severance should have been granted, Ballard's Reply Brief at

age 8, sets forth:

"Appellant Duke was quoted, from the record at the time of arraignment as saying that he had proof to show that certain individuals, including labor leaders and their attorneys, customs officers and members of the United States Attorney's office had entered into a conspiracy to obstruct justice by procuring false evidence to have him falsely indicted by the Grand Jury; that he wanted an early trial for the purpose of proving these matters.

These statements were made on June 3, 1955, in open court at the time of arraignment in Case No. 25276, the pending case and Case No. 25277 where Mr. Duke alone was a defendant (Appx. pp. 3-19).

After the making of these statements in open court before the Honorable Jacob Weinberger, Judge, everyone knew that there would be a dog fight, with the Government seeking to prove its charges and Appellant Duke seeking to prove that the charges were erroneously brought and by whom inspired.

Ballard filed his Notice of Motion to Move for a severance on June 15, 1955 (Appx. pp. 43-44). This motion for severance was heard and denied by the same Judge Weinberger, who had heard Mr. Duke's earlier statements (Appx. pp. 44 and 52-58)."

Neither lawyer nor Judge would have to be too astute to recognize the prejudice to any defendant on trial with Duke as codefendant after Mr. Duke's statement. Counsel for Ballard recognized it. Thus the motion for severance.

The United States Court of Appeals has by its opinion demonstrated the prejudice suffered by Ballard resulting from the denial of his motion for severance.

Moreover, it must be perfectly patent that the Jury felt as this Court did with reference to Mr. Duke, and the Jury with the comment of the Court before them allowed their feeling toward Duke to prejudice Ballard. Reference is made to Pages 27-28 Ballard's Opening Brief and a portion of the Reporter's Transcript Pages 3213 and 3214 where colloquy between Court and Counsel took place in the presence of the Jury:

> "(The COURT): *** Now, Mr. Whelan, do you want to state a position for Mr. Ballard? Do you join with Mr. Duke or are you at odds with him, as Mr. Langford is?
>
> "Mr. WHELAN: Your Honor pleases, I am not at odds with anyone. I think perhaps, as the evidence develops, there be some explanation as to why Ballard was included in this case.
>
> "Naturally, I want to take advantage of any situation that does develop. I am not claiming anything particularly at this time, unless it is supported by the evidence.
>
> "THE COURT: Your defense, insofar as

"I have observed here, is a defense of alibi. 'I wasn't present at the time.'

"MR. WHELAN: That is right, your Honor.

"THE COURT: And I suppose also that includes the defense, so far as the conspiracy is concerned, because conspiracy was over a considerable period of time when Ballard was present, at least, within the area in which the conspiracy supposedly operated.

"You haven't disputed that; that the defense is also, 'I did not do it.' "

(Rep. Tr., pp. 3213, l. 14 - 3214, l. 8)

It is significant to note that the statement of the ourt to counsel assumes a conspiracy "because con- piracy was over a considerable period of time when Ballard was present . . . ".

For the court to call upon Ballard to assume a osition or a defense would be a denial of his constitu- ional rights in violation of the Fifth Amendment to the Jnited States Constitution.

The decision of the United States Court of Appeals levotes four paragraphs to Ballard's separate appeal, s follows:

"Defendant Ballard was denied a bill of particulars because it was not clear who was actually to smuggle the birds into the United States and in what manner Ballard partici-

"pated in the conspiracy and the various acts. It is plain this was an attempt to have the evidence of the government disclosed before trial. The matter was in the discretion of the trial court, and this discretion was not abused.

It is likewise in the sound discretion of the trial judge to say whether defendants should be tried separately or together. Ballard was charged by one only of the ten counts. He claims he was prejudiced by denial of a motion for severance. The record shows there was nothing improper in trying all defendants together.

The court gave an instruction on alibi, at the request of counsel for Ballard. If there were any just criticism of the original instruction of the court as to alibi, it was thus corrected.

Evidence was admitted in rebuttal, which Ballard says was admissible in chief. This indicates there was no error. The trial court has discretion as to order of proof, and the evidence was admittedly competent. No prejudice was shown."

As to the first of the quoted paragraphs, this Honorable Court says: "no abuse of discretion"; as to the third, in effect "error corrected"; as to the fourth, "no prejudice shown".

As to the second quoted paragraph, this Honorable Court says: "The record shows there was nothing improper in trying all defendants together".

The record shows that the trial court felt that had a motion been made by Mr. Buono for a separate trial,

ıe (trial court) would have granted such a motion. (Trans. of Record P. 469. Rep. Tr. 3213-3214) Ballard made a motion for severance addressed to Judge Weinberger who handled the calendar and all pre-rial proceedings.

The trial court evidently thought that neither Buono nor Ballard should have been put on trial with Duke.

The opinion of the United States Court of Appeals ndicates the impropriety of trying all defendants to-gether.

I

APPELLANT BALLARD AS ONE OF HIS PRINCIPAL GROUNDS OF APPEAL URGED THAT HIS TIMELY MOTION FOR SEVERANCE SHOULD HAVE BEEN GRANTED.

In addition to what is set forth in Argument, herenabove, the fact is that counts one to three of the indictment charged and the evidence tended to prove "a remenduous traffic in the smuggling of psittacine birds" antedating the events of May 13, 1953, the key date in counts four to six where Ballard was named a defendant. The charges contained in counts seven to ten involved and concerned the matters charged in counts four to six, and Ballard, not at all.

This Honorable Court makes no reference to:

Castellani vs. United States, 64 Fed. 2d 636, where that Court approved:

"It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried."

United States vs. Perlstein, 120 Fed. 2d 276 at 283, where the Court says:

"The extent of the prejudice to Paul which resulted from the joint trial cannot now be determined but became obvious in many rulings upon the evidence."

II

BALLARD ON APPEAL URGED THAT THE DIGNITY OF THE UNITED STATES GOVERNMENT WILL NOT PERMIT THE CONVICTION OF ANY PERSON ON TAINTED TESTIMONY

Ballard cited Mesarosh vs. United States of America, Vol 77, Sup. Court Rep. page 1 (Oct. Term 1956), Reply Brief, pages 3 and 4. This Honorable Court makes no reference to that case, but does observe:

"The testimony furnished by co-laborers in the vineyard, who were characterized by one of the defendants as:

'John W. Hadzima, a twice convicted smuggler, Nicholas A. Spicuzza, a twice convicted smuggler, George Todd, a twice

"convicted smuggler, Raymond Curtis, convicted smuggler, Robert Helm, convicted smuggler, Mary Asconi, admitted handler of psittacine birds known by her to have been smuggled.' "

With the Mesarosh case in mind Ballard respectfully suggests in the interest of justice that this Honorable Court obtain from the U. S. Attorney a written report concerning the above-named Hadzima, Spicuzza, Tood, Helm, and Asconi and Curtis. Such a report Appellant believes and respectfully urges will show that since the trial in this case Hadzima has received a reduction of a prison sentence and forgiveness of a fine; that Spicuzza and Tood have received early paroles; that as to Helm a charge in violation of customs re- whiskey importation was dropped (this one different from the case referred to in the evidence in this case); that Curtis was never prosecuted; and that a charge against Asconi of smuggling psittacine birds (different from any incident in this trial) was dropped or that she received probation.

Counsel for Ballard has neither the inclination nor the facilities for checking these items out, but has full confidence in the integrity of the U. S. Attorney to correctly present these matters to this Honorable Court in writing; and counsel for Ballard will accept such written report from the U. S. Attorney unquestioned and unchallenged. In view of the testimony of these witnesses upon the trial of this case concerning lack of consideration to them for their testimony, an inquiry, in the light of the decision in Mesarosh, seems in order and if it appears the testimony of these witnesses was tainted testimony Ballard's conviction should not stand.

When Judge Fee (Page 9 Adv. Op.) writes "Humanitarian release on bail was capitalized by effecting new combinations and commission of other crimes" he could only be referring to the witnesses Hadzima, Spicuzza and Todd. The witnesses Helm and Curtis were, or had been, on probation for smuggling at the time of this participation.

Ballard was neither on probation nor on bail at the time of his alleged participation. Counsel for Ballard is not naive and will not conceal matters from this Court. Ballard had been sentenced to prison for crimes against State law - never Federal law, but had fully completed his sentences.

III

WAS THERE A FEDERAL OFFENSE

This latter statement points up the fact that this Honorable Court passed over Ballard's contention that the facts established no violation of Federal Law, but if the story of those delightful citizens Hadzima, Spicuzza, et al, was true, the crimes of robbery and assault with a deadly weapon, violations of State law, were made out - but no smuggling or conspiracy to smuggle.

Stripped of all non-essentials Ballard's conduct does not show a sordid story of intrigue, double-dealing and feuding. It does show a robbery, and a participation in a conspiracy to rob with his compensation a share of the proceeds of the loot.

CONCLUSION

Which is more important?

That Ballard be incarcerated in Federal Prison;

r

That every defendant accused of crime have the ight to a trial on the facts of the case, on the charge hat should be rightfully placed, with the protection of ll the rights which the law affords.

In other words - Ballard can stand incarceration etter than the cause of justice can stand a miscarriage f justice.

The opinion of this Honorable Court states:

> "No record of any criminal case is so perfect that an astute lawyer can not suggest possibility of error."

Could it not be said that a reasonable, able, competent nd thoroughly honest Judge might be swayed by circumtances as they appeared to him, to the point where he would write an opinion which would erroneously, though with complete honesty on the part of the Judge, deprive n appealing defendant of a substantial right?

It is respectfully urged that this Honorable Court grant Ballard's motion for Rehearing on Appeal in this case, and that it be reargued independently of his codefendants.

Respectfully submitted,
THOMAS WHELAN
Attorney for Appellant
Louis Glen Ballard.